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In The

Supreme Court of the United States

October Term, 1997

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC.; RICHARD BUCHANAN; CHAD BUSH; EDWIN GREENE; RITA MATHIS; ROGER ASTERINO; AND H.O.M.E., INC.,

Petitioners,

v.

CITY OF CINCINNATI; EQUAL RIGHTS, NOT SPECIAL RIGHTS; MARK MILLER; THOMAS E. BRINKMAN, JR.; AND ALBERT MOORE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT CITY OF CINCINNATI

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QUESTION PRESENTED FOR REVIEW

Whether a municipal charter amendment that prohibits a municipal government from creating "minority or protected status, quota preference or other preferential treatment" for "homosexuals, lesbians or bisexuals" violates the Equal Protection Clause?

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STATEMENT OF THE CASE

In 1991 and 1992 the City of Cincinnati passed two Ordinances that were aimed at providing certain groups of people with specific redress for alleged acts of discrimination. The foremost examples of these Ordinances were Ordinance number 79-1991 (hereinafter "EEO Ordinance") and Ordinance number 490-1992 (hereinafter "Human Rights Ordinance"). The EEO Ordinance made it illegal to discriminate on the basis of "sexual orientation" in hiring City employees and in making appointments to City Boards and Commissions. The Human Rights Ordinance made it illegal to discriminate on the basis of sexual orientation in the areas of private employment, public accommodation, and housing.[1]

In response to these measures, a group of private individuals formed an organization called "Take Back Cincinnati" which later changed its name to "Equal Rights Not Special Rights." One of the main priorities of this group was to collect sufficient signatures to place a Charter Amendment, which later became commonly known as Issue 3, on the ballot of the next general election.[2] The group was successful in obtaining the requisite

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[1] City Council has since repealed the portion of the Human Rights Ordinance forbidding discrimination on the basis of sexual orientation. Therefore, as petitioners correctly concede, the impact of Issue 3 on that measure is moot.

[2] The City of Cincinnati is a Charter Municipality organized and operating pursuant to the Home Rule provisions of Ohio's State Constitution. In a Charter municipality, the Charter acts as a sort of local constitution. Charter provisions supersede local ordinances, and the Charter may not be amended by the local legislature, which is known as City

number of signatures, and Issue 3 was placed on the November 2, 1993 ballot. Issue 3 provides as follows:

> "The City of Cincinnati and its various Boards and commissions may not enact, adopt, enforce or administer any ordinance, regulation, or policy which provides that a homosexual, lesbian or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of protected status, quota preference or other preferential treatment.
>
> This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force and effect."

In reaction to the formation of Equal Rights Not Special Rights, petitioner "Equality Cincinnati" was formed. One of the primary goals of Equality Cincinnati was to defeat the passage of Issue 3. Both Equality Cincinnati and Equal Rights Not Special Rights campaigned in favor of their respective positions on Issue 3. After a hard fought battle, Issue 3 was passed into law. The vote tally was approximately 62% for passage and 38% against.

Council. Rather, in order to amend the Charter, a majority of the voters in Cincinnati must vote in favor of a proposed revision or amendment at a general or special election. A measure may be placed on the ballot by City Council itself at its own initiative, but Council must place any measure on the ballot that has received the endorsement of a prescribed percentage of electors. Ohio Constitution, Article XVIII, Sections 3, 7, 8 and 9.

Prior to Issue 3 taking effect however, petitioners filed the present claim against the City of Cincinnati to enjoin the enforcement of Issue 3. As noted, petitioners claimed that Issue 3 violated their rights to equal protection, free speech, free association, and redress of grievances guaranteed by the First and Fourteenth Amendments to the United States Constitution. Petitioners also claimed that Issue 3 was unconstitutionally vague.

On November 15, 1993, Mark Miller, Thomas Brinkman, Jr., Albert Moore, and Equal Rights not Special Rights moved to intervene as defendants. On November 16, 1993, the trial court granted petitioners' motion for a preliminary injunction. On December 27, 1993, the district court granted the motion to intervene. On June 3, 1994, the trial court denied motions for summary judgment filed on behalf of the City and the intervening defendants.

A trial to the court was held and the trial judge heard testimony from a variety of expert and lay witnesses. After the trial, the district judge issued extensive findings of fact. The court concluded that the proposed Charter Amendment infringed petitioners' "fundamental right to equal access to the political process" as well as their rights of free speech and association and right to petition their government for redress of grievances, which violations subjected Issue 3 to strict scrutiny. Additionally, the court held that homosexuals as a group comprised a "quasi-suspect class." Further, the court found that Issue 3 was insufficiently related to any legitimate governmental interest to pass muster under a rational basis

analysis. Finally, the court held that Issue 3 was also void for vagueness.

The United States Court of Appeals for the Sixth Circuit reversed the district court's ruling in its entirety. First, the court of appeals noted that since the trial court's ostensible "findings of fact" were, in reality, findings of ultimate facts and interrelated applications of law, sociological judgments, mixed questions of law and fact, and/or findings designed to support "constitutional facts", these findings were subject to plenary appellate review.

Next, the court of appeals noted that homosexual orientation cannot be the basis for suspect classification in the context of Equal Protection analysis. Since homosexuals are not identifiable "on sight", those homosexuals that are affected by legislation concerning sexual orientation chose to be so affected by their conduct. Since *Bowers v. Hardwick*, 478 U.S. 186 (1986), held that homosexuals possess no fundamental right to engage in homosexual conduct, such conduct could not form the basis for suspect classification.

The court of appeals further held that there exists no fundamental right to equal participation in the political process. The cases upon which the district court relied for this fundamental right were, without exception, race-based classification cases. Since the realization of a homosexual legislative agenda is not constitutionally guaranteed, the narrow restriction upon the political avenues available to the unidentifiable and non-protected class of homosexuals and their allies does not rise to constitutional dimensions. The court of appeals recognized that

the opponents of Issue 3 "simply lost one battle of an ongoing political dispute."

Also, the court of appeals noted that Issue 3 did not impermissibly burden petitioners' rights of free speech or association, nor violate petitioners' right to petition their government for a redress of grievances. Since no fundamental right was involved the court of appeals found that the proper standard of judicial scrutiny was the "rational basis" standard. Under this highly deferential standard, social or economic legislation must be affirmed if there is any reasonably conceivable state of facts that could provide a rational basis for a classification. In other words, the party challenging the rationality of the legislation bears the burden of negating every conceivable basis for the action, regardless of whether or not such supporting rationale was cited by, or actually relied upon by the promulgating authority. The court of appeals noted that the measure furthered numerous legitimate public purposes, and therefore, passed constitutional muster when subjected to appropriate scrutiny.

Finally, the court of appeals held that Issue 3 was not unconstitutionally vague. This was especially true since City Council amended the Human Rights Ordinance to delete any reference to sexual orientation. Petitioners have not challenged the Sixth Circuit's ruling in this regard.

Petitioners timely filed their request to have this Court consider accepting an appeal. Subsequent to this Court's decision in *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996), invalidating the Colorado state constitutional

amendment, the writ was granted and the case was summarily remanded to the court of appeals "for further consideration in light of *Romer v. Evans* . . . "

Upon remand, the court of appeals ordered rebriefing by the parties and full rehearing (the latter conducted by that court on March 19, 1997) and, in a decision announced October 23, 1997, the court of appeals determined that Issue 3 and Colorado's Amendment 2 differ so critically that, while Amendment 2 offended the equal protection clause Issue 3 does not. "An exacting comparative analysis of *Romer* with the facts and circumstances of this case disclose that these contrary results were reached because the two cases involved substantially different enactments of entirely different scope and impact, which conceptually and analytically distinguished the constitutional posture of the two measures . . . the salient operative factors which motivated the *Romer* analysis and result were unique to that case and were not implicated in *Equality Foundation I.*" *Equality Foundation v. City of Cincinnati*, 128 F.3d 289, 295 (6th Cir., 1997) (hereinafter, *"Equality Foundation II"*).

In sum the court of appeals held that, " . . . the language of the Cincinnati Charter Amendment, read in its full context, merely prevented homosexuals, as homosexuals, from obtaining special privileges and preferences (such as affirmative action preferences or the legally sanctioned power to enforce employers, landlords, and merchants to transact business with them) from the City." *Equality Foundation II*, at 296. In "stark contrast" to the broad and sweeping language of Colorado's Amendment 2, the court of appeals found the language in Issue 3 to be "narrow" and "restrictive." *Id.*, at 297. Thus, the court of

appeals upheld the constitutionality of the charter amendment and directed that the district court enter judgment for the defendants. From that decision the petitioners timely took exception. They ask this Court to reject the reasoning of the United States Court of Appeals for the Sixth Circuit and adopt as law their own arguments. Respondent the City of Cincinnati opposes such suggestion and asks that the Court refuse the writ.

SUMMARY OF ARGUMENT

Petitioners' brief in support of the writ contains so many misstatements that specific enumeration is elusive. Nonetheless, perhaps the most incorrect statement is petitioners' bald assertion that "Cincinnati's Issue 3 charter amendment is identical in all material aspects to Colorado's 'Amendment 2.' " Although the motives for such a mischaracterization are obvious, is it nonetheless absolutely wrong. The fabrication is itself so material to petitioners' arguments that, once exposed there is little else respondents may succinctly add for this Court's consideration of the writ. It is precisely because Issue 3 and Amendment 2 are so distinct that the court of appeals has twice embraced the constitutionality of the notion that electors may democratically restrict their municipality's ability to award preferential treatment to a non-suspect class.

By its very language, Issue 3 deprives no citizen of the [equal] protection of the laws. Since it merely prohibits the granting of "special" or "preferential" treatment or privileges to gays, lesbians and bisexuals, Issue 3

represents an affirmation by Cincinnati citizens of the constitutional principle that these citizens, too, receive treatment from the municipal government that is equal to that afforded other, non-suspect-class-member citizens.

The Sixth Circuit's decision supports the right of the people, guaranteed by the constitutions of both the state of Ohio and the United States of America, to exercise the initiative process. The Sixth Circuit's decision ensures that irrespective of the consideration of their sexual orientation, all Ohio and Cincinnati citizens enjoy the right to petition their government for redress of grievances. The Sixth Circuit's decision supports equality. Respondent City of Cincinnati respectfully submits that the decision of the court of appeals gives due consideration not only to the plaintiffs but also to the First Amendment rights of all those citizens who voted to remove the ability of their elected and appointed municipal representatives to give additional, special, preferential treatment to a special interest group.

REASONS FOR DENYING THE WRIT

1. THE RULING BELOW IN NO WAY CONFLICTS WITH *ROMER V. EVANS*.

Petitioners argue that the court of appeals decision will prevent the City from enacting any anti-discrimination laws that will benefit that portion of the municipal citizenry that is "homosexual, lesbian or bisexual." To the extent that petitioners refer to the potential for enactment of privileges or preferences that are specific and unique to that group and would thus act to the disadvantage of

other citizens they are correct. However, to the extent that petitioners seek only such protections as are afforded all other citizens, their claim that all anti-discrimination benefits would be proscribed by the court's decision is flatly incorrect.

The key distinction between Cincinnati's Issue 3 and Colorado's Amendment 2, as noted by the court of appeals (and by Justice Scalia writing in dissent on the petition for a writ of certiorari in *Equality Foundation I*) is that Issue 3 prohibits only the enactment of special or preferential protection or treatment for this group while this Court found that Colorado's Amendment 2 might well prohibit any group member from making any claim of discrimination whatsoever.[3] This distinction is obvious when the two amendments are placed side-by-side. Colorado's Amendment 2 provided in pertinent part that:

> "Neither the State of Colorado through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status *or claim of discrimination*."

[3] "It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings." *Romer v. Evans*, at 517 U.S. at ___, 116 S.Ct. at 1626.

Romer v. Evans, 517 U.S. at ___, 116 S.Ct. at 1623 (emphasis added). In stark contrast to the reference in Amendment 2 that would prohibit any *"claim of discrimination,"* the language in Cincinnati's Issue 3 concludes by stating its blanket prohibition against "other *preferential* treatment." Petitioners refuse to identify this distinction as "material" simply because doing so would thwart their efforts to stand the Fourteenth Amendment on its head.

As the court of appeals noted, Issue 3's prohibition against preferences in no way prevents enforcement of any general, categorical municipal sexual orientation anti-discrimination law, unlike Colorado's Amendment 2, which banned even claims of discrimination. Prohibitions against discrimination on the bases of race, gender, etc. have never been found to accord any members of a subset of those groups (the "protected classes") "special" or "privileged" treatment. The conduct which is proscribed is the discrimination on the basis of the characteristic identified in the statute. The statute is not to be construed as "specially" or "preferentially" preventing discrimination against any identifiable subset within the statutory classification. For example, statutes prohibiting discrimination on the basis of race do not provide a specifically identifiable protection for African-Americans.

The only line of cases in which certain classes have been found to have received "special" rights are the affirmative action cases such as *City of Richmond v. Croson*, 488 U.S. 469, 109 S.Ct. 706 (1989) and *Bd. of Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978). In that line of cases, this Court consistently held that the creation of special rights, such as quotas and set-aside programs, violates the Equal Protection clause unless supported by

specific legislative findings indicating past patterns of discrimination and detailed findings that the remedy fashioned by the legislative body was narrowly tailored to combat such discrimination. See *Croson*, 109 S.Ct. at 724. This standard, as applied to racial classifications in *Croson* and *Bakke*, has been applied as well to gender-based classifications. See *F. Buddie Contracting Co. v. City of Elyria*, 773 F.Supp. 1018 (N.D. Ohio 1991). Thus, the Equal Protection clause itself has been found to prohibit the granting of "special" or "privileged" treatment except in very narrowly defined circumstances.

As such, any provision such as Issue 3, that purports to preclude special protection for any specified subset of a protected class would accomplish no more than the Equal Protection clause has been held to require in the above-cited line of cases. As no special treatment for an identifiable subset of a given classification can be conferred by a general anti-discrimination provision, a voter initiative that forecloses such special treatment is at most duplicative of the dictates of the Equal Protection clause and therefore in effect a nullity. Simply put, the voter initiative cannot "repeal" a protection that cannot have been properly accorded by the prior enactment. Just so, the holding of the court of appeals in *Equality Foundation II* does not conflict with this Court's ruling in *Romer*.

Nor does the court of appeals decision represent any infringement upon the ability of any Cincinnati electors to petition their government for redress of grievances. Constitutional rights to initiative and referendum are held by Ohio citizens under the state's constitution. These rights may not be abridged. Issue 3 does nothing to limit these rights, and the decision by the Sixth Circuit actually

reinforces the sanctity of that process.[4] Section 1f, Article II of the Ohio Constitution provides as follows:

> "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."

The rejection of a sufficient petition by a legislative authority constitutes an abuse of discretion. *State, ex rel. Citizens v. Widman*, 66 Ohio App.3d 286 (1990); *Heidtman v. Shaker Heights*, 99 Ohio App. 415, 119 N.E.2d 644 (1954), affirmed, 163 Ohio St. 109, 126 N.E.2d 138 (1955). Sections 8 and 9, Article XVIII of the Ohio Constitution provide that upon the submission of the proper initiative petition, City Council must place the question on the ballot at the

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[4] "In any event, *Romer* should not be construed to forbid local electorates the authority, via initiative, to instruct their elected city council representatives, or their elected or appointed municipal officers, to withhold special rights, privileges, and protections from homosexuals, or to prospectively remove the authority of such public representatives and officers to accord special rights, privileges, and protections to any non-suspect and non-quasi-suspect group. Such a reading would disenfranchise the voters of their most fundamental right which is the very foundation of the democratic form of government, even through the lowest (and most populist) organs and avenues of state government, to vote to override or preempt any policy or practice implemented or contemplated by their subordinate civil servants to bestow special rights, protections, and/or privileges upon a group of people who do not comprise a suspect or quasi-suspect class and are hence not constitutionally entitled to any special favorable legal status." *Equality Foundation II*, 128 F.3d at 298.

next general municipal election or at a special election called by Council. *State, ex rel. Blackwell v. Bachrach*, 166 Ohio St. 301 (1957). Council's review is limited to such matters as timeliness, regularity of signatures and form. Council is without authority to reject an initiative petition based upon claims of illegality or unconstitutionality of substantive provisions. *State, ex rel. Kittel v. Bigelow*, 138 Ohio St. 407 (1941). The charter amendment by initiative process must be liberally construed in favor of the exercise of this right by the electorate. *State, ex rel. Sharpe v. Hitt*, 115 Ohio St. 529 (1951); *State, ex rel. King v. Portsmouth*, 27 Ohio St.3d 1 (1986). In fact, if an initiative proposal is delayed at the Council level due to the failure of the Council to pass in timely fashion an ordinance directing that the measure be placed on the ballot, a mandamus action will lie against Council for abuse of discretion. *State, ex rel. Jurcisin v. Cotner*, 10 Ohio St.3d 171 (1984).

2. THE DEMOCRATIC DECISION BY MUNICIPAL ELECTORS TO WITHHOLD FROM THEIR MUNICIPAL GOVERNMENT THE POWER TO MANDATE PREFERENTIAL TREATMENT TO A NON-SUSPECT CLASS IS NOT A VIOLATION OF THE EQUAL PROTECTION CLAUSE.

In addition to the rational basis advanced above, *infra*, by this respondent that Issue 3 simply reaffirms the requirements of the Fourteenth Amendment, the decision of the court of appeals describes the "clear, actual, and direct individual and collective interests in that measure, and in the potential cost savings and other contingent benefits which could result from that local law." *Equality*

Foundation II, 128 F.3d, at 300, as contrasted with the facts in *Romer* where, "Clearly, the financial interests and associational liberties of the citizens of the state as a whole are not implicated if a municipality creates special legal protections for homosexuals applicable only within that jurisdiction and implements those protections solely via local governmental apparatuses." *Equality Foundation II*, 128 F.3d 300. The court of appeals decision notes the legitimacy of the significance attached by municipal electors to the financial implications of municipal-government-mandated preferential treatment for a non-suspect class, as contrasted with the facts in *Romer*. "Clearly, the Cincinnati Charter Amendment implicated at least one issue of direct, actual, and practical importance to those who voted it into law, namely whether those voters would be legally compelled by municipal ordinances to expend their own public and private resources to guarantee and enforce nondiscrimination against gays in local commercial transactions and social intercourse." *Id*. The court of appeals was very aware of the fact that this Court, in *Romer*, held that, with respect to Colorado's asserted state interest in conserving resources, "The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them." *Romer v. Evans*, 517 U.S., at ___, 116 S.Ct., at 1629. Although petitioners' brief implies that such interest was completely rejected by this Court in *Romer*, it is far more accurate to suggest that such interest was rejected only when advanced in support of a statewide law that conceivably banned any claim of discrimination. The repeated references throughout the decision by the

court of appeals to the limited scope of Cincinnati's Issue 3 are thus highly relevant.

CONCLUSION

For all of the above reasons, the petition for a writ of *certiorari* should be denied in this matter. The decision of the United States Court of Appeals for the Sixth Circuit should stand because it advances the most fundamental principle of our republic, to-wit: we Americans have the inalienable right to determine how we are governed. Further, the decision of the court of appeals reaffirms that right in consonance with the United States Constitution.

The decision of the court of appeals does not prevent lesbian, gay and bisexual Cincinnatians, but no others, from obtaining legal protection, as petitioners claim. In this case, it is abundantly clear that Cincinnatians do not wish to empower their municipal legislators or any other appointed municipal governmental representatives to enact laws or policies which would create quotas or other

preferential treatment, minority or protected status for this special interest group.

Respectfully submitted,

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